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No. 79-1051

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF ROHNERT PARK, PETITIONER

v.

MOON LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 220-240) is reported at 601 F.2d 1040. The order of the district court (Pet. App. 183-188) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1979. A petition for rehearing was denied

on October 26, 1979 (Pet. App. 254). The petition for a writ of certiorari was filed on January 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a municipal corporation, has standing to complain of alleged violations of federal antitrust laws by a neighboring town.

2. Whether petitioner has standing to complain that respondent Secretary of Housing and Urban Development violated the Housing Act of 1949, 42 U.S.C. 1441 *et seq.*

STATEMENT

Petitioner, the City of Rohnert Park, is located seven miles north of respondent City of Santa Rosa in Sonoma County, California. This case is a continuation of the dispute between the two cities over their respective plans to build new regional shopping centers. Petitioner seeks to prevent Santa Rosa from selling urban renewal land to respondent Ernest W. Hahn, Inc., a developer, for use as a shopping center. Petitioner alleges that Hahn is obtaining the urban renewal land at less than its fair reuse value in violation of the Housing Act of 1949, 42 U.S.C. 1460(c)(4). Petitioner also asserts that this transaction violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

1. Under the Housing Act of 1949, 42 U.S.C. 1441 *et seq.*, a locality such as Santa Rosa may obtain loans from the Department of Housing and Urban Development (HUD) to acquire slum or

blighted areas, selected in accordance with a general redevelopment plan approved by HUD. The local agency can clear the land and sell or lease it for private or public redevelopment consistent with the approved redevelopment plan for the area. 42 U.S.C. 1452, 1455. The local agency, however, must dispose of the land "at its fair value for uses in accordance with the urban renewal plan," 42 U.S.C. 1460(c)(4). Fair reuse value is not necessarily the same as fair market value, because urban renewal land must be used in accordance with the urban renewal plan (see 42 U.S.C. 1455(b)), and the plan may impose restrictions that reduce the value of the land. Before urban renewal land may be transferred by any local agency, HUD must review the disposition agreement to ensure that the land is being sold or leased at its fair reuse value and to determine that the transaction complies with other HUD requirements (Pet. App. 358-359; Resp. App. 64).

Santa Rosa adopted a redevelopment plan for its downtown area in 1961 (Pet. App. 5; Resp. App. 2). This plan was subsequently approved by the federal government, which agreed to assist the plan through both loans and grants (Resp. App. 60, 3). In 1969, after an earthquake caused substantial damage in downtown Santa Rosa, the renewal area was expanded, and HUD agreed to provide funding for redevelopment in this additional area (*id.* at 60-61, 2). The city investigated the possibility that a private developer might construct a shopping center on a part of this "Phase II" land, and it tentatively selected respondent Hahn (*id.* at 5). Thereafter, HUD was

asked to approve the proposed disposition price to Hahn of $2 million (*id.* at 9, 64).[1] HUD was not a party to the disposition agreement or any other agreement between the city and Hahn (*id.* at 64).

Appraisals for the affected land were prepared in 1970 and 1972, and an updated appraisal was prepared in October 1975 at HUD's request. The 1975 appraisal concluded that the fair reuse value of the property was $1.8 million (Resp. App. 9, 67). A HUD realty specialist reviewed the appraisals, inspected the land, reviewed comparable sales, and ultimately recommended that HUD approve the $2 million sale price to Hahn (*id.* at 67-68). No conflicting appraisals were submitted to HUD, although petitioner had by that time commenced the present action and had examined the Hahn proposal and the earlier reuse appraisals.

In November 1975 HUD advised the renewal agency that it could proceed at the proposed price (Resp. App. 64). In December 1975 the renewal agency held a hearing to review the 1975 appraisal. No representative of petitioner appeared, and no conflicting appraisal evidence was offered. At the conclusion of the hearing, the agency unanimously approved the proposal (*id.* at 10).

Meanwhile, in 1966, petitioner adopted a master plan designating certain land in Rohnert Park as a site for development of commercial facilities, including a regional shopping center (Pet. App. 4). Within this area, petitioner owns two parcels of land. One is designated for use as a proposed library site (R. 912-913, 915); the other is adjacent to railroad tracks (R. 912-913). Much of the remaining land in this area is owned by Codding Enterprises or a related company (R. 910-911). Petitioner alleges that it has expended funds to improve the site by constructing streets, sewers and water mains (Pet. App. 4).

[1] Hahn was also to purchase additional land from Santa Rosa (R. 382). But this land had not been purchased by Santa Rosa with HUD funds, and HUD was not required to approve its resale to Hahn (R. 240-241).

2. Codding Enterprises, which owns land in Rohnert Park's commercial zone and which is financing the present action by petitioner (R. 917-921), filed several cases in Sonoma County Superior Court challenging the Santa Rosa project (R. 242-287, 874-875; Pet. App. 132-134, 226 & n.2, 234-235).[2] At about the same time, petitioner brought the present action in federal district court requesting declaratory and injunctive relief. Petitioner alleged that the effect of Santa Rosa's agreement with Hahn was to "subsidize [Hahn] by the use of public funds" and thereby "enhance and render impregnable the already dominant position which [Santa Rosa] and its merchants have in the retail merchandising industry in * * * the Santa Rosa Trade Area" (Pet. App. 7, 8). Petitioner asserted that the agreement therefore violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.

Petitioner also asked for a declaration that the sale of land to Hahn at "less than the fair market value

[2] In one of these, the validity of HUD's determination of fair reuse value was decided adversely to Codding Enterprises. See Pet. App. 234-235 & n.8.

of the land for its highest and best uses permitted under the urban renewal plan" violated 42 U.S.C. 1460(c)(4) (Pet. App. 14). It therefore requested an injunction restraining the Secretary from approving the land disposition agreement.

3. After discovery was completed, the district court concluded that there were no genuine issues of material fact and granted the respondents' motions for summary judgment (Pet. App. 183-189). The court noted that petitioner did not claim that respondents had violated the Sherman Act by restrictive practices such as price fixing, or imposition of exclusionary clauses or territorial restraints. Instead, petitioner's claim, "pure and simple, is one of attempted preemption of future opportunities of others to compete by the planned construction of alleged excess retail store capacity" (Pet. App. 185). The court concluded that petitioner's attempt to characterize such alleged excess capacity as illegal, under the rationale of *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), must fail. In that case, Alcoa "abused its monopoly * * * [by attempting] to control that market by the continued expansion of its ingot production capacity to prevent others from entering the market" (Pet. App. 186). But here, respondents have no monopoly because they have not even commenced to build the planned shopping center. Moreover, even if the complaint were viewed as alleging an attempt to monopolize (for which a specific intent to monopolize must be established), "[petitioner] offers nothing from which a trier of fact can find such a specific intent. * * * Certainly the entirely lawful purpose to revitalize downtown Santa Rosa * * * could not sustain such a finding" (Pet. App. 187).

4. The court of appeals affirmed without reaching the merits of petitioner's claims, because the court concluded that petitioner lacks standing to sue (Pet. App. 220-240). The court held that petitioner, a local political subdivision "whose power is derivative and not sovereign" (Pet. App. 228, quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir.), cert. denied, 414 U.S. 1045 (1973)), cannot sue on behalf of its citizens under the Sherman Act as *parens patriae*. The court further held that petitioner's allegation that it has expended funds to improve its commercial zone does not give it standing under the Sherman Act and that petitioner also has failed to show any threat or harm to its proprietary interests as a property owner (Pet. App. 229). The court noted that, in view of the oversupply of retail floor space in the Santa Rosa area, any competition would be likely to adversely effect commercial development in Rohnert Park and that petitioner had not made a sufficient showing that the two city-owned plots, which are now apparently used for municipal purposes, would be selected as sites for commercial development in the future (Pet. App. 229-230).

With regard to the alleged Housing Act violations, the court concluded that the Housing Act does not create a private right of action against a city by an

adjacent city that does not own land within the redevelopment project. Applying the criteria established in *Cort* v. *Ash*, 422 U.S. 66 (1975),[3] the court decided that petitioner, as a neighboring city, is not "one of the class for whose *especial* benefit" (*id.* at 78) the Housing Act was passed (Pet. App. 234). Further, the legislative history of the Act suggests that Congress intended oversight by HUD, rather than private actions, as the means for enforcing local agency compliance with the fair price provisions. Permitting a private cause of action would hinder the purpose of the Act because it would delay renewal construction during the period of litigation. Moreover, there is an adequate private remedy under state law, for state "validating" proceedings provide a forum for challenging actions of the local urban renewal agencies (Pet. App. 234-235).

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[3] The Court there stated (422 U.S. at 78) (citations omitted; emphasis in original):

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Finally, the court of appeals held that petitioner lacks standing under the Administrative Procedure Act (APA) to claim that HUD has violated the Housing Act. Petitioner has not alleged that the Santa Rosa project would be abandoned or modified if a higher reuse value were ultimately determined for the land at issue. Further, petitioner has not alleged that businesses planning to locate at the Santa Rosa Shopping Center would instead choose to locate in Rohnert Park and that financing would be available to fund development in Rohnert Park. The court concluded that petitioner lacks standing because it has "failed to show that the prospective injury to its proprietary interest 'is likely to be reduced by a favorable decision'" (Pet. App. 239).

ARGUMENT

The decision of the court of appeals, on which we essentially rely, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1.*a.* Petitioner does not contend that the court of appeals erred in concluding that the Housing Act does not create a private right of action to challenge fair value determinations under 42 U.S.C. 1460(c)(4). This concession significantly limits petitioner's standing arguments. No other statute gives petitioner a cause of action against the private and state re-

spondents.[4] Petitioner's claims against these *non-federal* parties under the Housing Act could thus properly be dismissed even without inquiry into petitioner's standing. Where a cause of action does not exist, the issue of petitioner's standing to sue is also foreclosed. *Davis* v. *Passman*, 442 U.S. 228, 239-240 n.18 (1979); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974).

Petitioner's claim that HUD violated the Housing Act by approving the reuse agreement was also properly dismissed. Petitioner argues that the Administrative Procedure Act (APA) provides a cause of action against the agency to enforce the Housing Act and confers standing on every "person suffering legal wrong because of agency action," or "adversely affected or aggrieved by agency action within the meaning of [the] relevant statute." 5 U.S.C. 702. While the court of appeals agreed with this general proposition, it correctly held (Pet. App. 236-240) that petitioner is not within the class of aggrieved persons who have a direct stake in the controversy and are entitled to review of the agency's actions under the APA. See, *e.g.*, *United States* v. *SCRAP*, 412 U.S. 669, 686-690 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 731-741 (1972); *Data Processing Service* v. *Camp*, 397 U.S. 150, 153-158 (1970). Petitioner has failed to show that it would be likely to benefit

[4] The APA may, in appropriate circumstances, provide such a cause of action against the federal respondents. See Pet. App. 236.

in some tangible manner if the court granted the requested relief against HUD (see page 9, *supra*); petitioner's purely speculative inferences are insufficient to satisfy the standing requirement under either the APA or Article III of the Constitution. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976).

b. For essentially the same reasons, petitioner also lacks standing to pursue its claims under the Sherman Act. Section 16 of the Clayton Act confers standing on a broad, but not unlimited, class of persons to obtain an injunction against violations of the Sherman Act.[5] This provision has been construed as simply restating the "general rules of standing." See *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1174 (5th Cir. 1976). Under Section 16, suit may be brought by any person who has suffered a threatened loss or injury cognizable in equity, which proximately results from the alleged antitrust violation. See, *e.g.*, *Buckley Towers Condominium, Inc.* v. *Buchwald*, 533 F.2d 934, 938 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977); *Schwartz* v. *General Electric Co.*, 107 F. Supp. 58 (S.D.N.Y. 1952). Even taking all peti-

[5] Section 16 of the Clayton Act, 15 U.S.C. 26, provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity * * *.

tioner's assertions as true, and considering the evidence in the light most favorable to the petitioner (see *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), petitioner has failed to meet this standing requirement.[6] For petitioner has not alleged, and cannot establish, that the Santa Rosa project would be abandoned or modified if a higher reuse sale price were established. Moreover, petitioner's only proprietary interest is in the commercial property it owns in the shopping center. And, as the court of appeals correctly observed, petitioner has failed to allege that this land—which is primarily designated for a library site —will be available for commercial use, or that its value will be affected by the location of a regional shopping center (Pet. App. 229, 239). On the basis of the complaint, therefore, the court of appeals could properly conclude that petitioner has not shown standing under Section 16 of the Clayton Act.[7] *Simon* v.

[6] Contrary to petitioner's suggestion (Pet. 13-15, 18-19), it is not improper to decide the issue of standing upon a motion for summary judgment, rather than after a full trial. Standing is generally a preliminary matter (see, *e.g.*, *Santos* v. *District Council of New York City, etc.*, 547 F.2d 197, 199 (2d Cir. 1977)), and if the complaint, when considered together with any additional evidence in the case, does not adequately allege standing, the defendants are entitled to summary judgment. See, *e.g.*, *United States* v. *SCRAP*, *supra*, 412 U.S. at 686-690; *Public Citizen* v. *Lockheed Aircraft Corp.*, 565 F.2d 708, 714 n.22 (D.C. Cir. 1977); *Metcalf* v. *National Petroleum Council*, 553 F.2d 176, 189 n.126 (D.C. Cir. 1977).

[7] Petitioner's antitrust claim apparently does not seek to halt all shopping center development outside Rohnert Park, but only complains that "subsidized" development is a violation of the antitrust laws (see Pet. App. 7, 10). It is unclear why petitioner thinks the sale of the Phase II land, which HUD approved, is subsidized, since if the sale price is lower than the open market price, it is because of limits placed on the use of the land.

Eastern Kentucky Welfare Rights Organization, *supra*, 426 U.S. at 38.

Petitioner's claim (Pet. 21-25) that the decision in this case conflicts with decisions of this Court is without basis.[8] In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court held that a non-profit developer had standing to challenge a zoning decision that "st[ood] as an absolute barrier to constructing the housing" that the developer had contracted to build. *Id.* at 261. Here, by contrast, Santa Rosa has no authority to, and has not purported to, erect any barrier to the construction of a shopping center in Rohnert Park. This case is far closer on its facts to *Warth* v. *Seldin*, *supra*, on which petitioner also seeks

[8] Similarly, petitioner's claim (Pet. 19-20) that the decision below is in conflict with *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), is without basis. The Third Circuit there concluded that indirect purchasers had made a sufficient showing of proximate injury because "indirect purchasers can state unequivocally that under all circumstances prevalent in the real economic world, money is passing from their hands into the pockets of the price fixers as a result of the conspiracy." *Id.* at 593-594. Here, by contrast, petitioners entirely failed to show that "under all circumstances prevalent in the real economic world" they were being directly injured by the alleged violation; the effect of the alleged violation on petitioner's parcels is at best a matter of speculation.

to rely.[9] In *Warth*, the Court denied standing to non-residents who challenged a city's zoning restrictions, but who failed to show that removing the restrictions would allow them to purchase housing within the city. The plaintiffs in *Warth* lacked standing because they had established only a "remote possibility, unsubstantiated by allegations of fact" that their situation would be improved by the relief requested. 422 U.S. at 507-508. As in *Warth*, petitioner in this case also has failed to show that the relief it requests would result in commercial development of its property or in any other tangible benefit to its pecuniary interests.[10]

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[9] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), on which petitioner relies (Pet. 22-23), is also inapposite. Plaintiffs there challenged the constitutionality of the Price-Anderson Act, and alleged that, but for the protection of that Act, the nuclear facilities that were allegedly causing plaintiffs injury would not be completed and operated. Here, by contrast, petitioner simply has failed to reveal how the alleged Housing Act and antitrust violations have resulted in any injury to its pecuniary interests.

[10] In any event, petitioner's Sherman Act claim is frivolous and was correctly rejected by the district court. See *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936, 946 (6th Cir.), cert. denied, 414 U.S. 1068 (1973). HUD is not a party to any agreement with the non-federal defendants to construct a shopping center in Santa Rosa. HUD's participation simply fulfilled its statutory obligation to ensure that the resale price was correct, and that other HUD regulations were met. HUD's role in effect was that of a banker who makes a conditional loan to a person who is later accused of violating the antitrust laws; without further involvement, we do not believe the bank or HUD is liable under the antitrust laws for its customer's alleged violations. In particular, this Court has not ruled that the Secretary can be sued for violating the antitrust laws in circumstances where, as an employee of the federal government, he has acted within the scope of statutory duty. See, generally, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-363 (1977); *Parker* v. *Brown*, 317 U.S. 341 (1943).

In addition, we are not aware of any case where creation of "excess capacity", by itself, was found to violate the antitrust laws. As the district court correctly noted (Pet. App. 186), while Judge Hand discussed excess capacity in *United States* v. *Aluminum Co. of America, supra*, 148 F.2d at 429-431, that discussion was intended to show that Alcoa had abused its monopoly. This finding was necessary because mere possession of monopoly is not by itself enough to establish a violation of Section 2 of the Sherman Act. See, generally, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). Here, there can be no monopoly because the shopping center has not yet been built. And, if petitioner is attempting to allege an attempt to monopolize, the district court correctly observed that it had failed to allege facts showing the necessary element of specific intent (Pet. App. 186-187). See, *e.g.*, *Aluminum Co. of America, supra*, 148 F.2d at 432; *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). In the absence of such evidence, "the entirely lawful purpose to revitalize downtown Santa Rosa by the development of a regional shopping center that will deter a flight of population and business to the suburbs could not sustain such a finding" (Pet. App. 187).

Petitioner's claim under the Housing Act is also insubstantial. HUD based its approval on uncontradicted appraisal reports, and the district court properly refused to reverse the agency on the basis of appraisal evidence presented to that court that was never presented to either HUD or the renewal agency. This conclusion is confirmed by an intervening decision in state court proceedings (Pet. App. 234-235 & n.8) which held that the agency's conclusion that the Hahn contract was fair and equitable for the land according to its value for reuse was supported by substantial evidence and that HUD did not violate the Housing Act or its own regula-

2. Petitioner also contends that the court of appeals should have remanded the case to the district

court rather than deciding the question of standing on the appeal. But this contention is in error, for the question of standing is jurisdictional. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra*, 429 U.S. at 260. Moreover, there was an adequate record in the court of appeals for this issue to be determined. Contrary to petitioner's assertions here (Pet. 4-5, 13-15), the record clearly shows that petitioner's standing was raised in the district court in defendants' motions for summary judgment (Pet. App. 105, 108-111, 151-154, 159-160). Therefore, petitioner had "notice" of the issue and an "opportunity to produce admissible evidence demonstrating that there were genuine issues of material facts regarding the reality of its injury" (Pet. 4). Further, petitioner could have amended its complaint to overcome the specific shortcomings identified in the motions for summary judgment. Instead, petitioner chose to rely on the factual allegations contained in its original complaint (Resp. App. 75-76). Petitioner's claim of surprise on appeal is therefore unsupported.[11] Petitioner's assertion (Pet. 14-15) that

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tions. Indeed, the state court decision may well estop petitioner from pursuing its federal court claim, since the plaintiff in the state court actions (Codding Enterprises) has financed petitioner's current litigation (R. 917-920). See *Montana* v. *United States*, 440 U.S. 147, 154 (1979); Pet. App. 235 n.8.

[11] The cases petitioner cites concerning the proper disposition of factual issues raised for the first time on appeal (Pet. 14, 16, 17) are therefore inapposite. Likewise, *California Diversified Promotions, Inc.* v. *Musick*, 505 F.2d 278 (9th Cir. 1974), in which the district court dismissed a case *sua*

it should be given a chance to amend its complaint and litigate the issue anew in the district court is therefore without merit.

Petitioner also complains (Pet. 15-19) that the court of appeals should not have disposed of petitioner's Housing Act claim because the lower court had not decided the issue. But, although the district court did not discuss petitioner's Housing Act claim in its order, the district court did rule on that issue. It was presented by the complaint, and the district court dismissed the entire complaint, not just a portion of it. Compare Fed. R. Civ. P. 56(c) with Fed. R. Civ. P. 56(d). Petitioner's claims under the Housing Act were thus properly presented by the appeal and the court of appeals had jurisdiction to rule upon them. Cf. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 75 (1974).

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sponte without hearing, is not relevant here, because petitioner had ample opportunity to perfect its complaint. Moreover, this Court does not sit to resolve alleged intracircuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

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